IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL No. 551 of 2004
IN
L.C. SUIT NO. 3278 OF 1999

Salmanbhai s/o. Mohd. Noor .. Appellant
(Orig. Plaintiff)

vs.

The Municipal Corporation
of Greater Bombay .. Respondents
(Orig. Defendants)

WITH
FIRST APPEAL NO.552 of 2004
IN
L.C. SUIT NO. 3280 OF 1999

Mohd. Khalid Khan .. Appellant.
(Orig. Plaintiff)

vs.

The Municipal Corporation
of Greater Bombay .. Respondents
(Orig. Defendants)

WITH
FIRST APPEAL NO.553 of 2004
IN
L.C. SUIT NO. 3277 OF 1999

Mohd. Shafiq & Anr. .. Appellants
(Orig.Plaintiff)

vs.

The Municipal Corporation of
Greater Bombay ..Respondents
(Orig. Defendants)

WITH
FIRST APPEAL NO.554 of 2004
IN
L.C. SUIT NO. 3276 OF 1999

Gulam shabir Shaikh .. Appellant
(Orig. Plaintiff)

vs.

The Municipal Corporation
of Greater Bombay .. Respondents
(Orig. Defendants)

WITH
FIRST APPEAL NO. 556 of 2004
IN
L.C. SUIT NO. 3279 OF 1999

Mohammed Ayyub s/o. Mohd Sharif .. Appellant
(Orig. Plaintiff)

vs.

The Municipal Corporation

of Greater Bombay .. Respondents
(Orig.Defendants)

Shri R.A. Thorat, with B.P. Shukla, advocate for the Appellants.

Shri M.D. Patil, advocate for the Respondents.

CORAM: A.S. OKA, J.

DATE : 31st August, 2004.

JUDGEMENT :

1. Admit. Learned Counsel appearing for the Respondent waives service. Taken up for forthwith for final disposal with consent of the parties.

2. It is an admitted position that the facts of all the Appeals are more or less same and hence for the sake of convenience, reference is made to the facts of the Appeal No. 551 of 2004.

3. The Appellant is the Original Plaintiff and the Respondent Bombay Municipal Corporation is the Original Defendant. The challenge in the suit is to the order passed Under Section 351 of the Bombay Municipal Corporation Act, 1888 (herein after referred to as the "said Act of 1888"). The Respondent Corporation did not contest the suit as Written Statement was not filed. The Trial Court dismissed the suit.

4. The learned counsel appearing for the Appellants Mr. Thorat submitted that supplementary reply was given by Appellants on 27th May, 1999 to the notice under Section 351 of the said Act of 1888 in which it was stated that the suit structure was censused. He submitted that though an order was passed after submission of the said additional reply, the fact that the suit structure was censused was not considered by the ward officer while passing the order. He submitted that as the suit was not defended by the Respondent Corporation, the documents showing that the structure was censused were not produced before the Trial Court. The Learned Counsel appearing for the Appellant has filed the said documents in each Appeal alongwith an affidavit of the appellants. He submitted that in view of the various policies of the Respondent Corporation and in view of the fact that the suit structure is a censused structure, the Appellant was entitled to protection. He submitted that the Trial Court, therefore, has committed an error by dismissing the suit.

5. Shri Patil appearing for the Respondent Corporation stated that due to various difficulties faced by the Respondent Corporation, Written statement was not filed. He contended that the Appellants are not entitled

to protection on the basis of any of the policies of the Bombay Municipal Corporation. He submitted that, if opportunity is given, the Respondent Corporation will immediately file Written Statement.

6. At this stage the learned counsel appearing for the Appellant contended that infact on account of failure of the Respondent Corporation to file written statement, the Trial Court should have invoked the provisions of Rule 5 and Rule 10 of Order 8 of the Code of Civil Procedure, 1908 and ought have passed the decree in favour of the Appellants.

7. When the challenge in the suit was to an order of demolition of the suit structure on the ground that the same is unauthorised, the learned Trial Judge was right when he did not invoke the provisions of Rule 5 and Rule 10 of Order 8 of the said code and did not pass the Decree in favour of the Appellants only on account of failure of Respondents to file Written Statement.

8. From the compilation of documents annexed to Appeal, it appears that an additional reply was filed by the Appellants to the notice under Section 351 of the said Act of 1988 by contending that the structure was a censused structure. As the Respondent did not file

written statement, it is not clear whether the said additional reply was really submitted by the Appellants before the order was passed by the Ward Officer on the basis of the notice under Section 351. There are certain documents which are annexed to the additional affidavit filed by the Appellants in each first Appeal. According to the Appellant the documents annexed to the Affidavit which pertain to the suit structure show that the suit structure was a censused structure.

9. Whether the Appellants had filed additional reply or not and whether the suit structure was a censused structure or not are the disputed questions of facts which will have to be decided on evidence. Whether any of the policies of the Respondent Corporation will protect the suit structure or not is a matter of oral and documentary evidence and no finding can be recorded on those aspects in the First Appeal. Considering the facts and circumstances of the case, this is a fit case where the impugned Judgements and Decrees should be set aside and the suits be remanded to the Trial Court with a direction to permit the Respondent to file Written Statement. The learned counsel appearing for the Appellants stated that he has no objection if the Respondent is granted limited time to file written statement.

10. It must be noted here that time and again I have noticed that the Respondent Municipal Corporation has not filed Written statements in suits filed for challenging the orders passed by the Respondent Corporation for demolition of unauthorised structures. However, it is pointed out to me that due to lack of adequate staff, the Advocates representing the Respondent Corporation are not in a position to file written statements in some of the suits. Written statements are not filed in some matters where protection is sought to the alleged unauthorised structures. Prayers are being made for invoking the provisions of Rule 5 and 10 of Order 8 of the said Code of 1908 in such suits as written statements are not filed. It is necessary for the Commissioner of the Respondent Corporation to immediately look into the matter and to see that adequate staff is made available to the Advocates representing the Respondent Corporation. It is the responsibility of the Municipal Administration to ensure that such suits are defended properly by filing written statements. Hence, I pass the following order.

ORDER

(a) The Appeals are partly allowed. The impugned judgements and decrees are quashed and set aside and suits are remanded to the Trial

Court for hearing the same afresh.

(b) The parties are directed to appear before the learned Trial Judge on 11th October 2004. It will open for the Respondents to file written statements on or before 22nd November, 2004.

(c) The Appellants Plaintiffs are permitted to lead further oral and documentary evidence and the Respondent Corporation will also be free to lead oral and documentary evidence.

(d) The Learned Trial Judge is directed to decide the suits as expeditiously as possible and in any event on or before 31st December 2005. Till the disposal of the suits, the ad-interim relief operating during the pendency of the suits will continue to operate.

(e) It will be open for the Appellants/Plaintiffs to apply for amendment of the plaint within a period of four weeks from 11th October 2004. If the said application is made, the Trial Court will decide the same in accordance with law.

(f) All questions on merits are expressly kept open.

. All concerned to act on a copy of this order duly authenticated.

Sd/-

JUDGE